LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JUN 21 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. ~~1110~~ 210

WILLIAM T. REED, President
REED CANDY COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

DAVID A. CANEL,
10 So. LaSalle Street,
Chicago 3, Illinois,
Attorney for Petitioner.

LEONARD A. CANEL,
JAY A. CANEL,
10 So. LaSalle Street,
Chicago 3, Illinois,
Of Counsel.

The Scheffer Press, Inc.—ANdover 3-6850

SUBJECT INDEX AND AUTHORITIES CITED

Subject Index

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes Under Consideration	3
Statement of the Case	3
Reasons for Granting the Writ	7
I. The Court of Appeals decided a Federal Question in Direct Conflict with the Pronouncements Consistently Made by this Court	7
II. Non-Existent Powers Cannot Be Prescripted By an Unchallenged Use and Exercise Thereof	9
III. The Questions Presented are Substantial Questions which Should be Decided by this Court	11
Conclusion	12

Appendices.

Statutes Involved ..... App. A

Opinion Below ..... App. B

Authorities Cited.

Cases:

Caminetti v. U. S., 242 U. S. 470, 485 8

Commissioner of Immigration v. Gottlieb, 265 U. S. 310 7

Federal Trade Commission v. Ruberoid, 343 U. S. 470 7

PAGE

Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Company, 167 U. S. 479, 510 10

Norwegian Nitrogen Co. v. United States, 288 U. S. 294, 315 10

Texas & Pacific Railway Company v. United States, 289 U. S. 627, 640 10

United States v. Morton Salt Co., 338 U. S. 632, 647 9

United States v. Tanner, 144 U. S. 661, 663 10

STATUTES.

Clayton Act, as amended by the Robinson-Patman Act, Sec. 11 (38 Stat. 734; 15 U.S.C.A. 21) 3

Federal Trade Commission Act, Sec. 9 (38 Stat. 722; 15 U.S.C.A. 49) 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1957.

No.

WILLIAM T. REED, President
REED CANDY COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and The Associate Justices of the Supreme Court of The United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause pursuant to its decision dated April 11, 1957. A petition for rehearing *in banc*, and in the alternative a petition for rehearing by the same judges who decided the above entitled cause was timely filed. On May 20, 1957, the Court denied the petition for rehearing *in banc* and the petition for rehearing.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 243 F. 2d. 308 and is reproduced at pages 7a to 9a of Appendix B.

JURISDICTION.

The judgment sought to be reviewed was dated and entered by the United States Court of Appeals for the Seventh Circuit on April 11, 1957, and rehearing denied on May 20, 1957. The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code, 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

Throughout the history of this Court it has repeatedly held that the rule of *pari materia* cannot be applied by the Courts in the interpretation of a statute unless it appears that an ambiguity exists or is apparent in the statute.

First, the decision in the instant case is in direct conflict with the prevailing decisions of this Court in that the Court of Appeals decided that the Clayton and Federal Trade Commission Acts must be read and construed as one in such manner as to best effectuate the purpose of Congress in enacting them. It completely departed from the established decisional law made by this Court.

The second question presented by the decision is that if it had held that *pari materia* did not apply, it would be hesitant to reject the conclusion of the Federal Trade Commission fortified, as it is, by years of administrative practice, consistently and generally unchallenged. The conclusion of the Court of Appeals is again in direct conflict with the decisional law of this Court that unchallenged

administrative usage is, of itself, insufficient to create administrative authority.

The conflict created by the decision of the Court of Appeals in this case with the decisions of this Court must be resolved.

STATUTES UNDER CONSIDERATION.

1. Federal Trade Commission Act, Sec. 9 (38 Stat. 722; 15 U.S.C.A. 49).

2. Clayton Act, as amended by the Robinson-Patman Act, Sec. 11 (38 Stat. 734; 15 U.S.C.A. 21).

STATEMENT OF THE CASE.

The Federal Trade Commission, hereinafter called "Commission", issued a complaint against the Reed Candy Company, hereinafter called "Company", alleging the Commission had reason to believe the Company violated the provisions of sub-section (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act.

The complaint was referred to a Hearing Examiner.

The Commission caused the Hearing Examiner to issue a *subpoena duces tecum* directed to William T. Reed, Petitioner herein, President of the Company, to appear, testify and produce accounts, records, books and other documents. Said subpoena was issued under the purported authority of Section 9 of the Federal Trade Commission Act (38 Stat. 722; 15 U.S.C.A. Sec. 49).

Petitioner moved the Hearing Examiner to quash the subpoena on the ground that in a Clayton Act proceeding, Section 9 of the Federal Trade Commission Act is inapplicable. The Motion was denied. Petitioner appealed to the

Commission to overrule the action of the Hearing Examiner, but the ruling was affirmed.

Another subpoena was served on Petitioner in substantially the same form as the subpoena first issued. Petitioner refused to appear and comply with the subpoena on advice of his counsel that the Commission had no subpoena power in a proceeding under the Clayton Act, as amended by the Robinson-Patman Act; and that Section 9 of the Federal Trade Commission Act does not apply to the Clayton Act proceedings.

On May 7, 1956, the Commission filed an application in the United States District Court for the Northern District of Illinois, Eastern Division, alleging it had authority conferred upon it by Section 9 of the Federal Trade Commission Act, to apply for an Order in the District Court requiring the Petitioner to appear before the Commission, or a Hearing Examiner, and produce documentary evidence and answer all questions pertinent, relevant and material, necessary and proper in the conduct of the proceedings entitled "*In the Matter of Reed Candy Company*—Federal Trade Commission—Docket No. 6461".

Petitioner answered the application and stated:

1. Denied the Commission had authority under Section 9 of the Federal Trade Commission Act to issue the subpoena against Petitioner, in that, the proceeding against the Petitioner was not under the Federal Trade Commission Act, but was under the Clayton Act, as amended by the Robinson-Patman Act;

2. That the Company did not violate sub-section (d) of Section 2 of the Clayton Act (49 Stat. 1526; 15 U.S.C.A. Sec. 13), as amended by the Robinson-Patman Act.

3. That the Federal Trade Commission had no right, power or authority to issue the subpoena in this case (brought under the Clayton Act, as amended).

4. Affirmatively, the Petitioner stated that the Commission is seeking to use a remedy under the Federal Trade Commission Act when no proceedings are pending under that act, and the action of the Commission is illegal and void.

5. Petitioner further stated, the application seeks records of the Company, which is not a party to this application, and the said application is fatally defective for that reason.

6. Petitioner stated that there is no charge in the complaint filed before the Commission, or the application for the *subpoena duces tecum* filed before the District Court that the Company had violated or is violating the provisions of the Federal Trade Commission Act. In the proceeding against the Company, the Commission only has power under and by virtue of the Clayton Act, as amended by the Robinson-Patman Act, and said Act does not grant the Commission power to issue the *subpoena duces tecum* as prayed for in the said application. The subpoena, on its face, shows that it is not issued under and by authority of any right given the Commission by the Clayton Act, as amended, but is issued solely and by virtue of alleged power and authority granted to the Commission by the Federal Trade Commission Act, which Act is separate and distinct, and is not part of the Clayton Act, as amended.

On June 12, 1956, the District Court entered the following Order:

> "Pursuant to the authority granted in Section 9 of the Federal Trade Commission Act (38 Stat. 722; 15 U.S.C.A. Sec. 49), the Federal Trade Commission having invoked the aid of this Court in requiring the production of documentary evidence and the giving of testimony by William T. Reed, President, Reed Candy Company, as a witness in a proceeding insti-

tuted by the Federal Trade Commission against Reed Candy Company, Federal Trade Commission, Docket No. 6461,

and the Court having considered the application of the petitioner, it is hereby

Ordered: That the application of petitioner is granted, and that the said William T. Reed, President, Reed Candy Company, is hereby ordered to appear upon not less than ten days' notice at a time and place to be set by the Federal Trade Commission or a hearing examiner thereof within the jurisdiction of this Court, and to then and there produce all the documentary evidence identified and described in a subpoena issued by the hearing examiner of the Federal Trade Commission on April 2, 1956, and already served upon said William T. Reed, President, Reed Candy Company, and then and there to answer all questions relevant and material to and necessary and proper to the conduct of the aforementioned proceeding."

Petitioner perfected an appeal to the United States Circuit Court of Appeals for the Seventh Circuit. On April 11, 1957, the Circuit Court affirmed the decision and order of the District Court (Appendix B, Page 7a to 9a).

Petitioner filed a petition for rehearing *in banc* or in the alternative, a petition for rehearing by the same Judges who previously decided the case. On May 20, 1957, both petitions were denied.

REASONS FOR GRANTING THE WRIT.

I.

THE COURT OF APPEALS DECIDED A FEDERAL QUESTION IN DIRECT CONFLICT WITH THE PRONOUNCEMENTS CONSISTENTLY MADE BY THIS COURT.

In the decisions of this Court, some of which we will cite and comment upon under this heading, this Court has stated that before the rule of *pari materia* can be applied there must be an ambiguity in a statute.

In *Commissioner of Immigration* v. *Gottlieb*, 265 U.S. 310, the Court of Appeals reached its decision on grounds of *pari materia*. This Court reversed, and stated at page 314:

> "The contention that it is absurd and unreasonable to say that the wives and children of the ministers from the barred Asiatic zone are to be admitted and those outside of it denied admission, does not require consideration, since the result we have stated necessarily follows from the plain words of the law, *for which we are not at liberty to substitute a rule based upon other notions of policy or justice.* That aliens from one part of the world shall be admitted according to their status and those from another part according to fixed numerical proportions, *is a matter wholly within the discretion of the law-making body, with which the courts have no authority to interfere.*" (Emphasis added).

In the *Federal Trade Commission* v. *Ruberoid*, 343 U.S. 470 (1952), affirming 191 F. 2d 294, this Court held that the rule of *pari materia* could not be used to take a provision found only in the Federal Trade Commission Act, and incorporate it into the Clayton Act.

This Court said at page 479:

> "Effective enforcement of the Clayton Act by the Commission may be handicapped by the present provisions but that is a question of policy for Congress."

In *Caminetti* v. *U.S.*, 242 U.S. 470, at page 485, this Court said:

> "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. *Hamilton* v. *Rathbone*, 175 U.S. 414, 421. There is no ambiguity in the terms of this act."

When the Commission filed its application for a *subpoena duces tecum* against the Petitioner in the United States District Court, it grounded its application on Section 9 of the Federal Trade Commission Act and on no other statute. The Commission contended then, and contended in the Court of Appeals, that its power to issue the subpoena stemmed not from the Clayton Act, under which it was proceeding, but solely from Section 9 of the Federal Trade Commission Act. The alleged violation under investigation was brought not under the Federal Trade Commission Act but under the Clayton Act.

The Commission did not contend that there is any ambiguity in the Clayton Act as amended by the Robinson-Patman Act. There is none. In order to make the doctrine of *pari materia* applicable under the decisions of this Court there must be an ambiguity apparent on the face of the statute. No ambiguity is alleged or shown in the Clayton Act in reference to subpoena powers.

No showing of ambiguity is made in the application for the issuance of the subpoena; the order of the District

Court, or in the decision filed in the Court of Appeals. The criteria of the decisions of this Court has not been met. In fact, the decision merely states:

> "We agree with the Fourth Circuit that the history, purpose and decisional law concerning the Clayton and Federal Trade Commission Acts demonstrates that they are in *pari materia*—to be read and construed as one in such manner as to best effectuate the purpose of Congress in enacting them."

The very language concerning this subject is in conflict with the language of the decisions of this Court in which it is stated that the Courts do not make the law; that is left to the Legislature. Courts merely interpret the laws as made by Congress, and where there is no ambiguity the law must be sustained as written irrespective of the practical construction that an administrative body would like the Courts to make.

II.

NON-EXISTENT POWERS CANNOT BE PRESCRIPTED BY AN UNCHALLENGED USE AND EXERCISE THEREOF.

The Court of Appeals concluded its opinion by saying:

> "Even if the question were more doubtful than we think, we should be hesitant to reject the conclusion of the F.T.C. fortified as it is by years of administrative practice, consistent and generally unchallenged."

This statement is in direct conflict with the pronouncements made by this Court and is not the law of the land.

In *United States* v. *Morton Salt Co.*, 338 U.S. 632, 647 this Court said:

> "The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist, but if granted they are not lost by being allowed to lie dormant, *any more than nonexistent powers can be prescripted by an unchallenged exercise.*"

In *Texas & Pacific Railway Company* v. *United States*, 289 U.S. 627, 640 (1933):

> "Where a statutory body has assumed a power plainly not granted, no amount of * * * interpretation is binding upon the courts."

In *Interstate Commerce Commission* v. *Cincinnati, New Orleans and Texas Pacific Railway Company*, 167 U.S. 479, 510 (1897), the Interstate Commerce Commission made claim that it had certain powers; this Court said:

> "* * * it is urged that the commission has decided that it possessed this power and has acted upon such decision, and an appeal is made to the rule of contemporaneous construction. But it would be strange if an administrative body could by any mere process of construction create for itself a power which Congress had not given to it."

In *United States* v. *Tanner*, 144 U.S. 661, 663 (1893), this Court stated that irrespective of a previous construction of a particular section of a statute, where it is now clear that the construction given was erroneous, the Courts could give it the correct construction at any time.

In *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315 (1933), this Court held that administrative practice does not avail to overcome a statute which is plain so as to leave nothing for construction.

This Court consistently holds that administrative expediency cannot be substituted for a statute that is clear

and unambiguous. The Clayton Act as amended by the Robinson-Patman Act is clear and unambiguous. It describes each and every step that may be taken thereunder. The fact that an administrative agency such as the Federal Trade Commission has used it in a way contrary to the statute does not create for the Commission a power not granted to it by Congress even though use of the power has gone long unchallenged.

III.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL QUESTIONS WHICH SHOULD BE DECIDED BY THIS COURT.

The issue is clear-cut, that is: What are the constitutional powers of the three branches of Government, namely, the powers of Congress, the powers of the Courts and the powers of the Executive? In defining these powers it will logically follow that the determination of the issue as to whether or not a statute which is plain and unambiguous in its terms can be aided by the rule of *pari materia* for augmentation of powers not granted by the statute, and whether the use of a non-existent power by an administrative agency over a long period of time bars a challenge in the Courts testing the illegal use thereof.

The precise question as to whether or not the Federal Trade Commission has subpoena power in a Clayton Act case has never been decided by this Court. In the past year there has been much resistance to the use of this power by the Federal Trade Commission in the administration of Clayton Act cases. Legislation has been introduced to give such power to the Federal Trade Commission, but the legislation has never become law. With the expanding economy of the Country this question has now

become of great importance to both the Government and to business. It has resulted and will result in much litigation. This question will eventually, of necessity, have to be decided by this Court to set at rest once and for all the questions presented by this petition.

We respectfully submit, therefore, that if this Court did grant the petition for certiorari in this case and resolve the problem presented it would finally determine the power of the Federal Trade Commission to issue subpoenas in a Clayton Act proceeding, not only for itself, but for all the other administrative agencies that administer the Clayton Act.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

DAVID A. CANEL,
Attorney for Petitioner,
10 S. LaSalle Street,
Chicago, Illinois

LEONARD A. CANEL, and
JAY A. CANEL
10 S. LaSalle Street,
Chicago, Illinois
Of Counsel.

APPENDIX A.

Statutes Under Consideration.

U.S.C.A., Title 15, Section 49:

Documentary evidence; depositions; witnesses

For the purposes of sections 41-46 and 47-58 of this title the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure

to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of sections 41-46 and 47-58 of this title or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under sections 41-46 and 47-58 of this title at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty

or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: Provided, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

U.S.C.A. Title 15, Section 21:

Enforcement provisions; procedure.

Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18 and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the

violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title; if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a United States court of appeals, as hereinafter provided, the Commission or Board may at any time, upon such notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission or Board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have

jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission or Board. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission or Board, the court may order such additional evidence to be taken before the Commission or Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or Board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 1254 of Title 28.

Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside. A copy of such petition shall be forthwith served upon the Commission or Board, and thereupon the Commission or Board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same juris-

diction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order; and the findings of the Commission or Board as to the facts, if supported by substantial evidence, shall in like manner be conclusive.

The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

Such proceedings in the United States court of appeals shall be given precedence over cases pending therein, and shall be in every way expedited. No order of the Commission or Board or the judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust Acts.

Complaints, orders, and other processes of the Commission or Board under this section may be served by anyone duly authorized by the Commission or Board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

APPENDIX B.

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11839 SEPTEMBER TERM 1956—APRIL SESSION 1957

FEDERAL TRADE COMMISSION,
Petitioner-Appellee,
v.
WILLIAM T. REED, PRESIDENT, REED CANDY COMPANY,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 11, 1957

Before DUFFY, *Chief Judge*, LINDLEY and SWAIM, *Circuit Judges.*

SWAIM, *Circuit Judge.* This appeal questions the power of the Federal Trade Commission to issue subpoenas duces tecum in proceedings before the Commission on a complaint charging violation of the Clayton Act, as amended.

On November 21, 1955, the Federal Trade Commission ("F.T.C.") issued a complaint charging the Reed Candy Company with violation of Section 2(d) of the Clayton Act, as amended. 49 Stat. 1526, 15 U.S.C.A. § 13(d). The proceeding was duly assigned to an examiner of the F.T.C. for hearing and initial decision. The examiner, on February 20, 1956, caused a subpoena duces tecum to be served on William T. Reed, as President of the Reed Candy

Company, directing him to appear and testify before the F.T.C. and to produce certain documentary evidence described in the subpoena. Reed's motion to quash the subpoena was denied by the examiner and on appeal to the F.T.C. the examiner's ruling was affirmed. On April 4, 1956, another subpoena was issued which was identical in all respects with the first except that the date for the hearing was set for April 11, 1956. Reed did not appear at the April 11 hearing, but his counsel was present and he explained that Reed's refusal to obey the subpoena was upon the advice of counsel that the F.T.C. lacked subpoena power in proceedings under the Clayton Act.

On May 7, 1956, the F.T.C. filed an application in the United States District Court for the Northern District of Illinois, Eastern Division, for an order requiring Reed to comply with the subpoena. The District Court ordered Reed to appear and show cause why the application should not be granted. After answer to the application of the F.T.C. and a hearing on the matter the District Court, on June 12, 1956, entered an order directing compliance by Reed with the subpoena. From that order Reed has taken this appeal.

The arguments of the parties may be briefly summarized as follows: Reed contends that the Clayton Act, 38 Stat. 730, as amended, 15 U.S.C.A. §§ 12-27, prescribes a self-contained procedure for the enforcement of its provisions and does not contain a substantive grant of subpoena power. The F.T.C. contends that the subpoena and investigational powers granted it by the Federal Trade Commission Act, 38 Stat. 717, as amended, 15 U.S.C.A. §§ 41-46 and 47-58, may properly be used in the discharge of the F.T.C.'s duties under the Clayton Act, as amended. This question has recently been the subject of decision in the district courts. *Federal Trade Commission* v. *Menzies*, D.C. Md., 145 F. Supp. 164 (holding for the F.T.C.); and *Federal Trade Commission* v. *Rubin*, S.D.N.Y., 145 F. Supp. 171 (holding against the F.T.C.).

During the pendency of this appeal the *Menzies* decision has been reviewed and affirmed by the Court of

Appeals for the Fourth Circuit, per Judge John J. Parker, *Menzies v. Federal Trade Commission* (No. 7352, decided March 7, 1957), ... F. 2d ..... We agree with the Fourth Circuit that the history, purpose and decisional law concerning the Clayton and Federal Trade Commission Acts demonstrates that they are in pari materia—to be read and construed as one in such manner as to best effectuate the purpose of Congress in enacting them. We hold that the F.T.C. may properly use the subpoena power granted it by Section 9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U.S.C.A. § 49, in proceedings before the F.T.C. on a complaint charging violation of the Clayton Act, as amended.[1] Even if the question were more doubtful than we think, we should be hesitant to reject the conclusion of the F.T.C. fortified as it is by years of administrative practice, consistent and generally unchallenged.

The order of the District Court is

AFFIRMED.

---

[1] On April 2, 1957, the Court of Appeals for the Second Circuit sustained the power of the F.T.C. to subpoena documents pursuant to Section 9 of the Federal Trade Commission Act in a proceeding before the F.T.C. on a complaint charging violation of Section 7 of the Clayton Act. *Federal Trade Commission* v. *W. W. Tuttle, Resident Manager, Ernst & Ernst* (No. 24325), ... F. 2d .....